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# In the Supreme Court of the United States

OCTOBER TERM, 1975

**No. 75-651**

TEAMSTERS LOCAL UNION 657,
*Petitioner,*
vs.
JESSE RODRIGUEZ, et al.,
*Respondents.*

**No. 75-715**

SOUTHERN CONFERENCE OF TEAMSTERS,
*Petitioners,*
vs.
JESSE RODRIGUEZ, et al.,
*Respondents.*

**No. 75-718**

EAST TEXAS MOTOR FREIGHT SYSTEM, INC.,
*Petitioner,*
vs.
JESSE RODRIGUEZ, et al.,
*Respondents.*

## Brief for Respondents In Opposition to Petitions for Writs of Certiorari

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BRIEF FOR RESPONDENTS IN OPPOSITION
TO PETITIONS FOR WRITS OF CERTIORARI

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## OPINIONS BELOW

The Findings of Fact and Conclusions of Law of the United States District Court for the Western District of Texas, San Antonio Division (App. "A" of Southern Conference of Teamsters' Petition for Writ) are reported at 6 EPD ¶ 8815. The opinion of the Court of Appeals for the Fifth Circuit (App. "B" of Southern Conference of Teamsters' Petition for Writ) is reported at 505 F.2d 40.

## JURISDICTION

The jurisdictional requisites are adequately set forth in the Southern Conference of Teamsters' Petition for Writ.

## QUESTIONS PRESENTED

1. Was the Court of Appeals correct in ruling that this case was an appropriate class action?

2. Did the Court of Appeals, in a class action under Title VII of the Civil Rights Act of 1964, apply the correct legal standard?

3. Is there a substantial conflict between the Fifth Circuit Court of Appeals and

the Sixth Circuit Court of Appeals?

## STATEMENT OF THE CASE

Respondents,[1] who were plaintiffs below, are Mexican American "city drivers" for the East Texas Motor Freight System,[2] residents of San Antonio, Bexar County, Texas. Petitioners, who were the defendants below, are the ETMF, a corporation doing business in the state of Texas and city of San Antonio, which operates and maintains a local, city-wide freight terminal and city-wide trucking service in San Antonio, Bexas County, Texas, and an employer within the meaning of 42 U.S.C. §2000e-(b); the Teamsters Local Union 657, and the Southern Conference of Teamsters, which are the representatives

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1. Jesse Rodriguez, Sadrach G. Perez and Modesto Herrera, on their own behalf and on behalf of those similarly situatied.

2. Hereinafter "ETMF".



and bargaining agents of the plaintiff employees on a regional and local basis. The plaintiffs brought an employment discrimination class action, on behalf of all Mexican American and black "city drivers" of the ETMF included in the collective bargaining agreement entered into between ETMF and the Southern Conference of Teamsters covering the state of Texas, challenging two ubiquitous practices in the trucking industry: (1) the trucking companies' requirement that "city drivers" resign from their "city driver" jobs before applying for the more lucrative and sought-after "road driver" positions, and (2) the companies' rule preventing city drivers from carrying their seniority over to road driver jobs. Plaintiffs contended that these facially neutral practices of ETMF and the defendant union organizations perpetuate the effects of past discriminatory practices, as to the road driver positions, and thus violate Title VII of the Civil Rights Act of 1964, and 42 U.S.C. §1981.

Prior to trial, the parties stipulated that before 1970 ETMF had never employed a black or Mexican American as a road driver in

the Texas Southern Conference area. ETMF's road driver force, in that area, numbered approximately 180, all white/Anglo drivers. After charges were filed by respondent, Jesse Rodriguez, with the Equal Employment Opportunity Commission on August 20, 1970, the company hired three Mexican American road drivers in El Paso. By the time of trial, the company had still not hired a single black road driver in Texas.

Parties also stipulated that, although plaintiffs had filed written applications for employment as road drivers with the Terminal Manager in 1970, ETMF never considered the written applications and that these applications were transmitted to the Dallas corporate office of ETMF only after the filing of the Equal Employment Opportunity Commission charges.

Prior to trial, the parties stipulated, in addition to the above stipulations, that the charge of discrimination was based upon the fact that after their original employment, plaintiffs have been "locked-in" to the lower-paying job of city driver and denied jobs as road drivers by the operation of the industry-



wide practices of:

(a) requiring city drivers to resign their city driver jobs before applying for the more lucrative and sought-after road driver positions, and;

(b) preventing city drivers from carrying their seniority over to road driver jobs.

Plaintiffs further argued and indeed defendants stipulated that:

(a) ETMF had discouraged inquiries from plaintiffs concerning the qualifications and/or availability of road driver jobs;

(b) ETMF had always employed Anglo/white applicants as road drivers;

(c) ETMF's policy and practices of recruiting road drivers has been based on a word-of-mouth system. Since the company's road drivers and supervisory terminal personnel are almost exclusively Anglo/white, such a practice has continued the illegal exclusion of Mexican Americans and Negroes as road drivers.

Despite the evidence adduced by the plaintiffs, and the stipulations recited

above, the District Court for the Western District of Texas held that the defendants did not violate 42 U.S.C. §2000e-5, nor any section of Title 42 relating to race discrimination. Rodriguez v. East Texas Motor Freight, No. SA-71-CA-302 (W.D. Tex., March 22, 1973), Petitioner Teamsters Local Union 657's Appendix to Petition for Writ at p. A-1 through A-12. The court concluded that the cause of action was not a proper cause of action and dismissed the class action claims in the complaint and denied all relief to plaintiffs. Local 657's Appendix at p. A-12.

Plaintiffs appealed, and on November 25, 1974, the Fifth Circuit Court of Appeals, Wisdom, Circuit Judge, reversed and held that plaintiffs met class action requirements and could maintain an action on behalf of all the carrier's Mexican American and Negro city drivers who were included in the collective bargaining agreement; that there was evidence that discrimination had been practiced in the past in hiring of road drivers; that the "no transfer" policy and maintenance of separate seniority rosters for city and road drivers perpetuated the past discrimination and that



the fact that there was no business necessity precluding the hiring of city drivers for road driver positions established that the carrier had discriminated against plaintiffs and the plaintiffs' class. The Fifth Circuit further held that participation by union organizations in the establishment of separate seniority rosters constituted a violation of the civil rights statutes. The Court of Appeals reversed with instructions for the District Court to consider the issue of remedy, and provided the boundaries within which the decree must be drawn.[3/]

3. The Court of Appeals, on remand, ordered the District Court to monitor carefully the criteria used by ETMF to prevent minority city drivers from transfering to road driver jobs. Rodriguez v. East Texas Motor Freight, 505 F.2d 40, 61 (5th Cir. 1974).

## STATEMENT OF THE FACTS

ETMF is an interstate common carrier by motor truck of general freight. The ETMF system conducts its business by carrying loads of merchandise between cities within the ETMF system in ten-speed tractors with semi-trailers driven by "road drivers". Freight is collected from customers and delivered to ETMF terminals and picked up from terminals and delivered to customers in smaller, compact equipment driven by "city drivers". In the trucking industry, "road driver" is considered a separate job classification from "city driver". Road drivers have the most prestigious driving job in the trucking industry, and they usually bring home the highest pay.

City drivers and road drivers are covered by different collective bargaining agreements. The petitioner Teamsters Local Union 657, has a collective bargaining agreement with ETMF which covers city drivers at ETMF's terminal in San Antonio. Petitioner Southern Conference of Teamsters, a delegate body of the International Brotherhood of Teamsters, is

made up of representatives from the affiliated locals in ten southern states.

Since 1954 ETMF has followed a "no transfer" policy, prohibiting the transfer of drivers between city and road driver classifications and between terminals. Under the policy, in order for a city driver to obtain a position as a road driver, he must resign his city driver job and apply for a road driver slot. He thereby forfeits all accumulated seniority. In effect, he stands on no better footing in applying for a road driver job than a complete stranger to the company. And if his bid to be a road driver fails, there is no guarantee that he will be rehired as a city driver. ETMF's "no transfer" policy is complemented by the fact that under collective bargaining contracts between ETMF and petitioner Local 657, city drivers who transfer to road positions do not carry over their "competitive status" seniority, that is, seniority for job bidding and lay-off purposes.

For thirty days in 1972, ETMF relaxed its no-transfer policy and allowed city drivers to transfer, if they could qualify.



This temporary modification did not, however affect the dual seniority system established by the separate collective bargaining agreements. Any city driver transferring to the road, under the modified policy, still lost his seniority for job bidding purposes. Moreover, the one-time-only change in policy opened the possibility of transfer only to those city drivers who worked at terminals domiciling road drivers; the restrictions on interterminal transfers remained in effect.

The parties stipulated that before 1970 East Texas Motor Frieght had never employed a black or Mexican American as a road driver in the Texas Southern Conference area. Only after charges were filed by plaintiff, Jesse Rodriguez, with the Equal Employment Opportunity Commission, did the company hire three Mexican American road drivers in El Paso. By the time of the trial, the company had still not hired a single black road driver in Texas. With the exception of one temporary road driver, ETMF has never domiciled any road driver in San Antonio. Therefore, the named respondents and other San Antonio city drivers were not able to take advantage of the temporary modification

of the "no transfer" policy in the winter of 1972.

In 1970, the named plaintiffs applied for road driver jobs. ETMF has stipulated that it never considered these applications for employment as road drivers. Respondent Rodriguez filed a written charge with the Equal Employment Opportunity Commission on August 20, 1970, alleging that the policies of ETMF, Local 657, and the Southern Conference of Teamsters relegated Mexican Americans and blacks to city driver jobs. Respondent Herrera filed similar charges on March 11, 1971, and respondent Perez on June 7, 1971. Respondents filed their class action on October 26, 1971 in the United States District Court for the Western District of Texas, against ETMF, the Southern Conference of Teamsters, and Teamsters Local Union 657, alleging national origin and racial discrimination in violation of the Civil Rights Act of 1866, 42 U.S.C. §1981, and Title VII of the Civil Rights Act of 1964. Plaintiffs' cause of action under Title VII was authorized by §706(f)(1) of the Act, 42 U.S.C. §2000e-5, which expressly permits such private actions, under certain specified conditions not at issue here.



## REASONS FOR DENYING THE WRITS

### I. THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT THIS WAS AN APPROPRIATE CLASS ACTION.

Petitioners argue that the Court of Appeals, in disregard of Rule 23, Federal Rules of Civil Procedure, incorrectly held that this was a class action. The Court of Appeals correctly rejected that argument and held that the requirements of Rule 23(a) must be read liberally in the context of suits brought under Title VII and §1981. Suits brought under these provisions are inherently class suits. By definition, discrimination on the basis of race or national origin is a class wrong, Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir. 1968); and a suit charging employment discrimination is naturally "a sort of class action for fellow employees similarly situated." Jenkins v. United Gas Corp., 400 F.2d 28, 33 (5th Cir. 1968); see also, Parham v. Southwestern Tel. Co., 433 F.2d 421, 428 (8th Cir. 1970). When class relief is sought in the complaint, the court should apply liberally the requirements of Rule 23(a). See, Bing v. Roadway Express, Inc., 485 F.2d 411, 446

(5th Cir. 1973).

The Court of Appeals correctly held that there was no serious dispute that plaintiffs had satisfied the first three criteria of Rule 23(a). The class clearly meets the requirements that the members be so numerous that joinder would be impractical, that there are common questions of law and fact, and that the claims and defenses of the representative parties are typical. Defendants challenged only the fourth requirement, that the named parties "fully and adequately protect the interests of the class." The petitioner's challenge is on the wholly untenable ground that some minority employees had opposed seniority merger at the union meeting. The company's altruistic concern is commendable. However, not only is no information provided as to such important factors as the nature of, attendance at, or circumstances surrounding the "vote", but, more importantly, the Court of Appeals in Bing v. Roadway Express, Inc., 444 F.2d 687, 691, (5th Cir. 1971), flatly rejected any suggestion that employee preference "should be accorded greater weight than plaintiffs' rights under Title VII." Furthermore,



the "interests" to be represented by Rule 23 class representatives are the legal interests of that class, rather than the personal preferences of some individual members of that class.

The Court of Appeals correctly found that:

> Even taking the results of the vote at face value, we reject the district court's conclusion that there was sufficient reason to dismiss the class action in this case. Especially in light of the fact that the evidence of the union vote was not received until two weeks after the trial, there were two preferable options open to the trial judge. First, he could have shaped the class to remove any possible antagonism between the representatives and some of the city drivers. The court could have narrowed the class or separated it into subclasses for purposes of relief. See Oatis v. Crown Zellerbach Corp., 398 F.2d at 499. Or, the court could have shaped the relief to avoid any injustice to the dissenting class members. District courts have wide discretion in fashioning relief under Title VII, Franks v. Bowman Transportation Co., 5 Cir. 1974, 495 F. 2d 398, 414; Bing v. Roadway

> Express, Inc., 485 F.2d at 448-449. And flexibility and careful tailoring of judicial decrees in Title VII cases are the order of the day. See, e.g., Sabala v. Western Gillette, Inc., S.D. Tex. 1973, 362 F. Supp. 1142. The disagreement here concerned only the proper remedy; there was no antagonism with regard to the contention that the defendants practiced discrimination against the plaintiff class. We do not believe that disagreement within the class as to remedy desired, surfacing so late in the litigation, should have resulted in a dismissal of the class action.

Rodriguez v. East Texas Motor Freight, 505 F.2d 40, 51 (5th Cir. 1974).

The Court of Appeals, relying upon the evidence introduced at trial by the plaintiffs and the stipulations entered into by the parties, correctly found that Rule 23(a) had been met and that the action was an appropriate class action.



## II. THERE IS NO CONFLICT BETWEEN THE FIFTH AND SIXTH CIRCUITS.

Petitioners incorrectly argue that the decisions of the Fifth and Sixth Circuits are in substantial conflict. Petitioners have failed to meet their burden of showing a conflict between the Circuits. Petitioners argue that the local union in Thornton v. East Texas Motor Freight, 497 F.2d 416 (6th Cir. 1974) was held not liable, while in Rodriguez the local union, along with the regional union and the employer, were held liable. We submit that there is no substantial conflict. In Thornton, the Court of Appeals held the local union not liable because of a lack of substantial evidence that the local union had "acquiesced" in the company's "no transfer" rule. In the instant case, in contrast, it is the creation and maintenance of separate seniority rosters for road and city drivers, without provision for seniority carryover by minority city drivers in the collective bargaining agreement, that forms the crux of the complaint against the union defendants. The Court of Appeals correctly held that for their role in

continuing the effects of this discrimination the union defendants must share the blame and the liability.

Another distinguishing factor is that the Court of Appeals in Thornton was convinced that the plaintiffs there really only wanted to file charges against the company and not against the union. 497 F.2d at 426. In contrast, the plaintiffs in the instant case have always maintained that the defendant unions are equally liable.

On these facts, the decision of the Court of Appeals in the Fifth Circuit was correct and not in conflict with the Sixth Circuit.



## III. THE COURT OF APPEALS USED THE CORRECT LEGAL STANDARD IN HOLDING THAT PLAINTIFFS HAD MADE OUT A PRIMA FACIE CASE OF UNFAIR DISCRIMINATION.

Petitioners argue that the Court of Appeals erred in holding that plaintiffs in a class action under Title VII of the Civil Rights Act need only a statistical imbalance to establish a prima facie case of racial discrimination.

The Court of Appeals correctly held that a prima facie case of discrimination may be established by statistical evidence. The Court of Appeals relied on United States v. Hayes International Corp., 456 F.2d 112, 120 (5th Cir. 1972), which held that the inference of discrimination arises from the statistics themselves and no other evidence is required to support the inference. It is now commonly accepted that a Title VII plaintiff can establish a prima facie showing of unlawful discrimination by the introduction of statistical

data.[4/] Once such a showing is made the burden of proof shifts to the defendant. Bing v. Roadway Express, Inc., 444 F.2d 687, 689 (5th Cir. 1971). Rowe v. General Motors Corp., 457 F.2d 348, 358 (5th Cir. 1972) holds that once the plaintiff establishes a prima facie case, the burden shifts to the defendant to rebut the statistics or to explain the disparity in hiring. In the instant case, the statistics are overpowering. Defendant ETMF stipulated to these statistics prior to trial. These figures clearly establish a prima facie case of past discrimination.

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4. See, Bing v. Roadway Express, Inc., 444 F.2d 687 (5th Cir. 1971); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970), cert. denied, 401 U.S. 954 (1971); Parham v. Southwestern Tel. Co., 433 F.2d 421 (8th Cir. 1970); Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972); United States v. Hayes International Corp., 415 F.2d 1038 (5th Cir. 1969); United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971).



The Court of Appeals correctly applied the legal standard of showing a prima facie case by statistical evidence.

Petitioners incorrectly argue that the Court of Appeals' decision is in conflict with this Court's decision in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The Court of Appeals correctly held that nothing in McDonnell Douglas is inconsistent with the accepted practice of federal courts recognizing statistics as establishing a prima facie case of employment discrimination.

McDonnell Douglas was concerned with the order and allocation of proof in a private, non-class action challenging employment discrimination. 411 U.S. at 800. Furthermore, the Court observed in a crucial footnote that the test outlined in the opinion for a prima facie case "is not necessarily applicable in every respect to differing factual situations." 411 U.S. at 802, n. 13. The Court of Appeals was clearly correct in its finding that the present case differs in several significant respects from McDonnell Douglas. First, this is a class action. Equally important, in

McDonnell Douglas there was no history of past discrimination or any other factor that might have discouraged plaintiff from applying for a job. In contrast, in Rodriguez, there was a past history of employment discrimination. There is another distinction of importance in McDonnell Douglas, the fact that respondent's qualifications were undisputed. In the instant case, in contrast, the possibility of meeting one of the most important criteria for hiring, the road test, has been denied to the class of city drivers. Deprived of this opportunity, plaintiffs could not prove they were qualified to become road drivers.

The Court of Appeals correctly applied the legal standard in the establishment of a prima facie case of employment discrimination.



## IV. THERE IS NO CONFLICT BETWEEN THE CIVIL RIGHTS ACT OF 1964 AND THE NATIONAL LABOR RELATIONS ACT.

Petitioner Local 657 correctly argues that it could not, acting alone, have effected any relief for plaintiff's class. But it was the integrated action, or inaction, of the local union and petitioner Southern Conference of Teamsters which led the Fifth Circuit to impose liability. The local union and the Southern Conference are not separate entities. The Southern conference negotiated the discriminatory supplemental agreement. Local 657 signed that discriminatory agreement, and actively administered its discrimination at the terminal level.

> For their role in establishing separate seniority rosters that failed to make allowance for minority city drivers who had been discriminatorily relegated to city driver jobs, Local 657 and the Southern Conference must be held accountable.

Rodriguez, supra, 505 F.2d at 61. Such intimate identity was not present in National Labor Relations Board v. International Brotherhood of Electrical Workers, 266 F.2d 349 (5th

Cir. 1959), which involved an attempted jurisdictional usurpation by the Electrical Workers of jobs held by the United Steelworkers, an altogether different union.

Correctly viewed, this case presents no conflict with National Labor Relations Board v. Borg-Warner Corp., 356 U.S. 342 (1958), since petitioner's liability does not depend upon categories of bargaining subjects, but upon its failure to take any action to eliminate, and its acquiesence in, the discriminatory effects of arbitrary restrictions.

The union's "obligation 'to represent all members of an appropriate unit requires [it] to make an honest effort to serve the interests of all those members, without hostility to any . . .' and its powers are 'subject always to complete good faith and honesty of purpose in the exercise of its discretion' [citation omitted]." Humphrey v. Moore, 375 U.S. 335, 342 (1964).

The Fifth Circuit Court of Appeals found that:

> The plaintiffs' prima facie case of hiring discrimination,



> and proof that the seniority system, a creature of the collective bargaining agreement, transmitted the discrimination into the present, shifted the burden to the defendant unions to show that the present discriminatory effects were unavoidable, that is, required as a business necessity.
>
> The primary justification offered by the union defendants is that in contributing to the establishment of separate seniority rosters they were merely following the desires of the majority of their black and Mexican-American members. Once again the defendants rely on the post-trial defeat by members of Local 657 of a proposal to merge city and road driver contracts as an indication of the preferences of a majority of Mexican-American and black city drivers. As we mentioned earlier, the degree to which the vote should be taken to represent the true desires of members of the plaintiff class is uncertain. In any event, the unions perceive their responsibility too narrowly. There are established ways to eliminate the lock-in effect of separate seniority rosters without merging rosters and jeopardizing the seniority

rights of those city drivers who remain in their positions. Most obviously, seniority carryover can be allowed on a one-time-only basis for qualified minority city drivers who wish to transfer to the road. See, e.g., Thornton v. East Texas Motor Freight, supra; Bing v. Roadway Express, Inc., 485 F.2d 441; United States v. Central Motor Lines, Inc., W.D.N.C. 1971, 338 F. Supp. 532. No reciprocal arrangement for road drivers would have to be necessary, because they have suffered no discrimination. See United States v. Chesapeake & Ohio Ry. Co., 4 Cir. 1972, 471 F.2d 582, 593. We believe a one-time-only transfer with seniority carryover was an alternative that could have eased the discriminatory effects of the separate seniority lists without injury to any minority city driver. This reasonable alternative vitiates the business necessity defense. See United States v. St. Louis-San Francisco Railway Co., 464 F.2d 301 at 308; Robinson v. Lorillard Corp., 444 F.2d at 798.

For their role in establishing separate seniority rosters that failed to make allowance for minority city



drivers who had been discriminatorily relegated to city driver jobs, Local 657 and The Southern Conference must be held accountable. They have violated 42 U.S.C. § 2000e-2 and 42 U.S.C. § 1981. The district court's finding to the contrary is clearly erroneous.

Rodriguez, supra, at 61.

The issues in the present case are sufficiently narrow, and no amount of strained semantics can convert it into one warranting review by this Court on certiorari.

## CONCLUSION

For the reasons stated above, respondents submit that the Petitions for Writs of Certiorari in the instant case should be denied.

Respectfully submitted,

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